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c/o Ms Judith Levine
Permanent Court of Arbitration Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

14 April 2017

Dear Ms Levine,

Re: PCA Case No. 2012-07: *Mohamed Abdel Raoul Bahgat v. The Arab Republic of Egypt*

The Claimant refers to the Respondent's Reply Memorial on Jurisdiction dated 23 March 2017 ("**Reply**"). The Reply raises three substantive new objections to jurisdiction ("**New Objections to Jurisdiction**"). The Respondent's New Objections to Jurisdiction were not made in the Respondent's Answer to the Request for Provisional Measures dated 17 October 2012 ("**IMs Answer**"), nor in its Interim Measures Rejoinder dated 21 November 2012 ("**IMs Rejoinder**"), nor in its Request for Bifurcation dated 26 January 2013 ("**Request for Bifurcation**"), nor in its Memorial on Jurisdiction dated 15 July 2013 ("**Memorial**"). For the reasons set out below, the Claimant respectfully requests that the Tribunal dismiss these New Objections to Jurisdiction as inadmissible at this late stage of the jurisdiction phase.

1. The Respondent's New Objections to Jurisdiction

The Respondent's New Objections to Jurisdiction pertain principally to (1) new allegations of dual nationality (Reply, Section I.C). This appears to be an attempt by the Respondent to shore up its objections to jurisdiction following the definitive finding of the Supreme Administrative Court ("**SAC**") that the Claimant is, and has been since 1971, a Finnish national. However, the Respondent also appears to raise new challenges to the Tribunal's jurisdiction on the basis (2) of an alleged failure to comply with the jurisdictional requirements laid down in Article 8 of the 1980 BIT (Reply, paras. 174-180 and 182); and (3) that "the 1980 BIT cannot confer jurisdiction on this Tribunal to sit in proceedings conducted under the UNCITRAL Arbitration Rules and administered by the PCA" (Reply, paras. 181-182).

2. Neither the UNCITRAL Rules 1976 nor the rules of this proceeding permit the Respondent to submit its New Objections to Jurisdiction at this late stage

The Respondent is precluded from raising its New Objections to Jurisdiction at this late stage by both the UNCITRAL Arbitration Rules 1976 ("**UNCITRAL Rules 1976**") and the rules of this proceeding.

The UNCITRAL Rules 1976 stipulate that the deadline for raising a "plea that the arbitral tribunal does not have jurisdiction" is "the statement of defence" (Article 21(3)). Where, as here, proceedings have been bifurcated following a Claimant's full statement of claim, the reference to "statement of defence" in the UNCITRAL Rules 1976 must be understood as referring to a respondent's response to the statement of claim;[1] namely, in this case, the Respondent's Memorial.

The importance of raising jurisdictional objections in a timely fashion is underscored by most major institutional rules. Like the UNCITRAL Rules, other leading international arbitration rules require any jurisdictional objections to be raised, at the latest, in the statement of defence (or its equivalent).[2] The aim of such time limitations is "to ensure that any objections to the arbitral tribunal's jurisdiction are raised without delay",[3] thus facilitating procedural fairness and efficiency.

In this case, the requirement that the Respondent raise any jurisdictional objections at the latest by its Memorial is further underscored by Procedural Order No. 1 dated 19 September 2012 ("**PO 1**"), which provides that the Respondent's Reply shall be:

> "only in rebuttal to the Claimant's Counter-Memorial on Jurisdiction".[4]

Procedural Order No. 3 dated 25 September 2013 ("**PO 3**") similarly provides that:

> "The Respondent shall file its Reply Memorial on Jurisdiction but only in rebuttal to the Claimant's Counter-Memorial […] and Supplementary Counter-Memorial".[5]

3. The inadmissibility of the New Objections to Jurisdiction is confirmed by the jurisprudence of international tribunals

As the tribunal in *Euram v. Slovakia* stated, "a respondent [does not have] an unlimited power to add new jurisdictional objections".[6] There are numerous examples of international tribunals dismissing objections to jurisdiction on the basis that they have been submitted out of time. In *CME v. Czech Republic*, for example, the tribunal found that the respondent had waived a jurisdictional objection by raising it too late.[7] The tribunals in *Oostergetel v. Slovakia*[8] and *Euram*

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1 UNCITRAL Rules 1976, Articles 18 and 19.

2 *See e.g.* Article 23(2), UNCITRAL Arbitration Rules 2010; Article 23(2), PCA Arbitration Rules 2012; Rule 41(1), ICSID Arbitration Rules; Article 45(2), ICSID Additional Facility Rules 2006; Article 24(2), SCC Rules 2010; Article 15(3), ICDR Rules 2009; Article 23(3), LCIA Arbitration Rules 2014; Article 21(3), Swiss International Arbitration Rules.

3 David D. Caron, Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2012), p. 455 ("**UNCITRAL Commentary**").

4 PO 1, para. 2.15 (emphasis added).

5 PO 3, para. 5 (emphasis added).

6 *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Second Award on Jurisdiction (4 June 2014) ("***Euram v. Slovakia***"), para. 118.

7 *CME Czech Republic B.V. v. The Czech Republic*, Partial Award (13 September 2001), paras. 379-380.

8 *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award (23 April 2012), para. 137.

v. Slovakia[9] (both applying the UNCITRAL Rules 1976), and *Autopista v. Venezuela* (applying the ICSID Arbitration Rules)[10] also dismissed late objections to jurisdiction.

As the leading commentary on the UNCITRAL Rules 2010 states (and certain tribunals have confirmed),[11] "the arbitral tribunal has discretion in limited circumstances to admit justifiably late pleas, such as due to the discovery of new evidence".[12] Such circumstances are not present here. On the contrary:

a. The Respondent's delay in putting forward its New Objections to Jurisdiction is excessive. The Respondent had the opportunity to, but did not, put forward the New Objections to Jurisdiction in its various submissions on jurisdiction between October 2012 and July 2013 (namely, the IMs Answer, IMs Rejoinder, Request for Bifurcation and Memorial). The Respondent has not even acknowledged its long delay in submitting its New Objections to Jurisdiction, let alone attempted to justify that delay. The SAC judgment is not a "new fact" justifying a new "dual nationality" objection, because that judgment merely confirms what the Respondent itself acknowledged in 2002 – that the Claimant was and is a Finnish national.[13] Nothing prevented the Responding from raising its new "dual national" objection in 2012.

b. Second, the prejudice to the Claimant in the Respondent's 4-year delay in raising its New Objections to Jurisdiction is significant. First, in the intervening period, evidence surrounding the Claimant's "effective" nationality, raised as an issue for the first time in this case in the Reply, may have been lost or witnesses may have become unavailable. Second, the Claimant decided not to oppose the Respondent's Request for Bifurcation in January 2013 so that the Tribunal could rule on the plea concerning its jurisdiction as a preliminary question and "with a view to reducing avoidable expenses and costs".[14] As the Tribunal will recall, in the meantime the Respondent unilaterally raised questions about the Claimant's Finnish nationality with the immigration authorities in Finland.[15] The Claimant then agreed to suspend the arbitral proceeding, ultimately for more than three years, until the resolution of the Finnish court proceedings.[16] The Respondent's abrupt U-turn – which apparently signifies that the Respondent no longer considers the Claimant's Finnish nationality dispositive of its *ratione personae* objection – is remarkable.

c. Finally, if admitted, the New Objections to Jurisdiction would cause unnecessary additional cost and prejudice to the Claimant in responding to them. This is aggravated by the fact

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9 *Euram v. Slovakia*, at n. 6 above, paras. 16.5 and 129-130.

10 *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (23 September 2003), para. 90.

11 For example, *Euram v. Slovakia*, at n. 6 above, para. 115.

12 UNCITRAL Commentary, at n. 3 above, p. 456.

13 **Exhibit C68**, p. 5 of 8 (Respondent's letter to the Finnish Embassy in Cairo, 21 October 2002, stating that "He [Mr Bahgat] has acquired the Finnish citizenship in addition to the Egyptian nationality").

14 Letter from the Claimant to the PCA, 26 February 2013.

15 **Exhibit C71** – Copies of (a) the Note of Enquiry from Respondent to the Finnish Embassy in Cairo dated 26 December 2012; (b) Reply from the Finnish Immigration Service dated 22 January 2013 with an English translation and (c) Verbal Note dated 2 January 2015 from the Respondent's Embassy in Finland to the Finnish Foreign Office. *See also*, Letter from the Claimant to the PCA, 30 August 2013.

16 Procedural Order No. 3 dated 25 September 2013.

that, as a result of the Respondent's ongoing defaults, the Claimant is having to finance the entire cost of this proceeding.

For all the reasons set out above, the Respondent's New Objections to Jurisdiction are plainly out of time and inadmissible.

4. The Respondent is, moreover, estopped from advancing two of its New Objections to Jurisdiction

The Respondent's conduct in this arbitration compounds the conclusion that it is precluded by estoppel from advancing its New Objections to jurisdiction at this stage.

As a matter of international law, estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorised to speak for the State with respect to the matter in question; (c) the State (or, in this case, investor) invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State (or investor) was entitled to rely.[17] Each of these components is met here.

In relation to the Respondent's new dual nationality objection, the Respondent has consistently represented in this proceeding that the question of whether the Claimant was a Finnish national at the relevant times will be dispositive of to the Tribunal's *ratione personae* jurisdiction.[18] The Claimant reasonably relied upon the Respondent's formulation of its *ratione personae* objection in its IMs Answer and Request for Bifurcation. Moreover, it did so to its detriment, and the Respondent's benefit, in agreeing to bifurcate the proceeding and to suspend the proceeding for more than three years pending the outcome of the Finnish court proceedings. As a result of those concessions, the Claimant – a 76-year-old man – will have waited over five years just for a hearing in the jurisdiction phase of this proceeding.

The Respondent is also estopped from advancing its new objection relating to the applicable rules and administering authority of this arbitration.[19] Early in this proceeding, the Tribunal asked the Parties to advise it of "the institution, if any, which the Parties have designated or whether they prefer to leave such determination to be made by the tribunal following consultation with the Parties".[20] After an exchange of correspondence, the Respondent accepted "that the Arbitration Proceedings be held at and administered by the Permanent Court of Arbitration".[21] The Respondent also, during this period, consistently referred to the application to this proceeding of the

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17 See, for example, *Chagos Marine Protected Area Arbitration (The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland)*, Award (18 March 2015), para. 438.

18 IMs Answer, paras. 53-54; Request for Bifurcation, paras. 35, 40 ("in order to be eligible to claim against Egypt under either of the two BITs between Finland and Egypt, Claimant must be a Finnish national (as determined by Finnish law) during a relevant period of time"); letter from the Respondent to the PCA, 11 January 2017 ("The Tribunal's jurisdiction ratione personae under the Finland-Egypt BIT thus turns on Claimant's Finnish nationality at the time of the relevant events").

19 *See Mr. Franz Sedelmayer v. The Russian Federation*, Arbitration Award (7 July 1998), pp. 33-34 (concluding that the respondent was estopped from presenting objections concerning irregularities in the tribunal's appointment procedure by having participated in that appointment procedure without raising any objections at the time).

20 Letter from the PCA to the Parties, 22 February 2012.

21 Letter from the Respondent to the PCA, 14 March 2012.

UNCITRAL Rules 1976 and confirmed their application by signing the Terms of Appointment.[22] The Claimant reasonably relied on these representations of consent. It did so to its detriment – if the Respondent had articulated its objection earlier, the Claimant could have sought agreement with the Respondent on a different administering authority and different procedural rules.

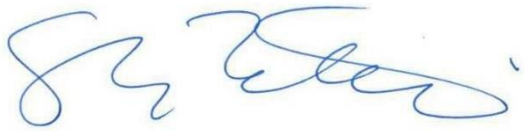
In these circumstances, and independently of the requirements of the UNCITRAL Rules 1976, PO 1 and PO 3, the Respondent is estopped from introducing at least two out of three of its New Objections to Jurisdiction at this late stage of the proceeding. International jurisprudence recognises estoppel as "a place for some recognition of the principle that a State cannot blow hot and cold – *allegans contraria non audiendus est*".[23] The circumstances described above fulfil the requisite elements of an estoppel under international law.

5. Conclusion and request

To permit the Respondent's belated New Objections to Jurisdiction would violate the UNCITRAL Rules 1976, PO 1, PO 3, and general principles of law and procedure applicable in this arbitration. It would seriously prejudice the Claimant's rights. Moreover, and in any event, the Respondent is estopped from raising its New Objections to Jurisdiction.

The Claimant accordingly requests that the Tribunal dismiss the Respondent's New Objections to Jurisdiction as inadmissible.

Yours sincerely,



Stephen Fietta
Principal

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22 E.g., letter from the Respondent to the PCA, 14 May 2012; *see also* Terms of Appointment, 15 June 2012, section 4.

23 A.D. McNair, 'The Legality of the Occupation of the Ruhr', 5 *British Year Book of International Law* 17, 35 (1924).

Essex Court Chambers

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